IN THE

Supreme Court of the United States

October Term, 1961

No. 108

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

Petitioner

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA et al

Respondents

BOARD OF EDUCATION OF THE CITY OF SAN DIEGO,

Petitioner

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA et al

Respondents

On Petition for Writs of Certiorari to the Supreme Court of the State of California

REPLY BRIEF FOR PETITIONERS

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TOPICAL INDEX

Page

I. Petitioner, Board of Education of the City of Los Angeles is Using the Regulation Cited by Respondents During the Interregnum Between the Issuance of the Mandate of the California Supreme Court and Action by This Court on the Pending Petition (Reply to Respondents' Point I). 1

II. A Federal Question is Presented in This Case Because (1) The Opinion is Bottomed, in Part, On An Earlier State Court Decision Which Interpreted the Scope of the First and Fourteenth Amendments to the Federal Constitution, and (2) The State Court Has Here Interpreted Federal Constitutional Provisions As Being Co-Extensive With the Counterpart State Constitutional Provisions (Reply to Respondents' Point II). 3

III. Respondents Have Misquoted From the Text of Petitioner's Petition for Rehearing Filed in the Court Below. 7

TABLE OF CASES AND AUTHORITIES CITED

Cases

Page

Communist Party v. Peek, 20 Cal. 2d 536 3
Danskin v. San Diego Unified Sch. Dist., 28 Cal. 2d 536 ..... 3, 4, 5
Flournoy v. Wiener, 321 U.S. 253 6
Schlemmer v. Buffalo, R. & P. R. Co., 205 U.S. 1 6
Standard Oil Co. of Calif. v. Johnson, 316 U.S. 481 6
United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290 2
Walling v. Helmerick & Payne, 323 U. S. 37 2

Authorities

Calif. Education Code, Sec. 16564 2
Calif. Education Code, Sec. 16565 ..... 2, 4, 8
United States Constitution, Fourteenth Amendment 4, 5

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REPLY BRIEF FOR PETITIONERS

I.

PETITIONER, BOARD OF EDUCATION OF THE CITY OF LOS ANGELES IS USING THE REGULATION CITED BY RESPONDENTS DURING THE INTERREGNUM BETWEEN THE ISSUANCE OF THE MANDATE OF THE CALIFORNIA SUPREME COURT AND ACTION BY THIS COURT ON THE PENDING PETITION (REPLY TO RESPONDENTS' POINT I).

Respondents attempt to forestall a review of the action of the California Supreme Court by alleging

the absence of a justiciable controversy between the respondents and one petitioner, Board of Education of the City of Los Angeles due to a regulation adopted by that petitioner (Resp. Br., Appx. "A"). In so doing, respondents argue as if the new regulation was necessarily a permanent one. Not so. This petitioner, faced with a peremptory writ of mandate from the highest court of California, felt obligated to take some action to comply with the court's directive and still enforce Section 16564 of the Education Code which section proscribes the use of school property for acts of subversion.

Petitioner fully intends to again require full compliance with Section 16565 of the Education Code should this Court determine that such compliance may be constitutionallly required.

In any event, it should be recognized that this petitioner has the ability to revoke this regulation at any time and again require compliance with Section 16565 of the Education Code. Thus, it cannot be said that mere cessation of a prohibited activity renders the pending matter non-justiciable since petitioner may again resume enforcing the statute. (cf.: *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290; *Walling v. Helmerich & Payne*, 323 U.S. 37)

Further, since this petition is a joint one and involves identical questions as to both petitioners, it appears to be of little avail to respondents to allege non-

justiciability as to only one petitioner. Even assuming the validity of respondents' argument, this Court is faced with the identical constitutional issues with regards to the other petitioner, Board of Education of the City of San Diego.

II.

A FEDERAL QUESTION IS PRESENTED IN THIS CASE BECAUSE (1) THE OPINION IS BOTTOMED, IN PART, ON AN EARLIER STATE COURT DECISION WHICH INTERPRETED THE SCOPE OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION, AND (2) THE STATE COURT HAS HERE INTERPRETED FEDERAL CONSTITUTIONAL PROVISIONS AS BEING CO-EXTENSIVE WITH THE COUNTERPART STATE CONSTITUTIONAL PROVISIONS (REPLY TO RESPONDENTS' POINT II).

There is no gainsaying the fact that the Supreme Court of California grounded its opinion in the instant case in part on its earlier decision in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536. *Danskin*, however, is not, as respondents would have it, a ruling ". . . posited upon the provisions of a state constitution." (Resp. Br., pp. 10-11). That decision in so many words indicated that it was based on the application of federal constitutional principles.

> "These cases (*Communist Party v. Peck*, 20 Cal. 2d 536, and other cited cases) involved the general test of reasonableness under the due pro-

> cess clause, *whereas the present case calls for the application of the strict standards of the First Amendment, which in the fields protected by that Amendment are read into the Fourteenth Amendment.*" *Danskin,* supra, 28 Cal. 2d at 550.
> (Brackets and emphasis ours)[Fn.]

Thus, the *Danskin* decision necessarily involved the construction and scope of federal constitutional rights, by the State Court.

While respondents state that the instant decision rests on non-federal grounds (Resp. Br., p. 6), the opinion of the Supreme Court of the State of California nowhere states exactly what sections of the Federal or State Constitution are assertedly violated. Although the Supreme Court of California indicated at the beginning of its opinion (Petition, Appx. "A," 3A), that the basis for respondents (petitioners below) refusal to conform to the requirements of Section 16565 of the Education Code was an asserted violation of both the Federal and State Constitutions, nowhere else in the opinion does the Court even mention the State Constitutional provisions, but, on the contrary, relys in the main on opinions of this Court interpreting Federal constitutional rights. Even *Danskin*, relied on by the Court below, is, as pointed out, supra, a decision based on Federal grounds.

[Fn.] Compare the language of the concerning opinion of Mr. Justice Carter in *Danskin*, supra, which recognizes the Federal grounds implicit in the decision: "In my opinion this (the legislation under attack) cannot be done without violating the provisions of the First and Fourteenth Amendments to the Constitution of the United States" (28 Cal. 2d at 556)

Further, an examination of the language of *Danskin*, supra, and of the Court's decision in the case at bar, indicates that the Court below speaks only in broad terms of "unconstitutionality," treating the State and Federal constitutional provisions as co-extensive, and in effect placing idential meanings on them. Thus, no distinction is made between the provisions of the Federal bill of rights as made applicable to the States by the Fourteenth Amendment and the bill of rights provisions in the State constitution,[Fn.] the California court apparently construing the state and federal provisions as one.

California constitutional freedoms of speech and assembly are no broader than the federal constitutional freedoms nor are they more restrictive. A violation of one violates the other; a statute permissive under one is permissive under the other. The judicial interpretations by the California court of the Federal Constitution and its counterparts in the State Constitution constitute one unified body of law.

The contention of respondents that this decision rests solely on non-federal grounds seems to logically lead to the conclusion that *no* case in which a State statute is held constitutionally infirm by a State Court as being in conflict with one of the rights protected by the United States Constitution could ever be reviewed

[Fn.] The rights of freedom of speech and assembly provided in the State Constitution are not identical in wording to those in the Federal Constitution (cf Petition p 8 and Petition Appx "D")

by this Court if the same right was protected by the same or similar provision in the State Constitution. Where, as here, the federally adopted decisions form the heart and core of the constitutional interpretation by the State court, it is submitted this Court has jurisdiction to review. (See: *Standard Oil Co. of Calif. v. Johnson,* 316 U.S. 481; see also the dissenting opinion of Frankfurter, J., in *Flournoy v. Wiener,* 321 U.S. 253, 270-272, and the opinon of Holmes, J., in *Schlemmer v. Buffalo, R. & P. R. Co.,* 205 U.S. 1, 11).

III.

RESPONDENTS HAVE MISQUOTED FROM THE TEXT OF PETITIONER'S PETITION FOR REHEARING FILED IN THE COURT BELOW.

As printed in respondents' brief (Resp. Br., pp. 7-8) a certain phrase was omitted from the text of the quotation taken from the Petition for Rehearing filed with the California Supreme Court. Such an omission, while undoubtedly inadvertent, seriously alters the meaning and context of petitioner's request for a modification of the court's opinion. The quotation at page 7 of respondents' brief should correctly read:

> "THE OPINION SHOULD BE MODIFED TO INDICATE WHETHER THE STATUTE INVOLVED IS UNCONSTITUTIONAL BECAUSE IT CONFLICTS WITH THE STATE CONSTITUTION OR BECAUSE IT CONFLICTS WITH THE UNITED STATES CONSTITUTION."
>
> "The court has held a statute enacted by the legislature unconstitutional. It is a matter of great concern to petitioners herein whether the court holds the legislative enactment invalid *because of conflict with the United States Constitution or* because of conflict with the California Constitution."

The emphasized words were omitted in the brief submitted by the respondents.

Of course what petitioners were requesting of the Court below was a clarification of its ambiguous holding that Section 16565 of the Education Code was unconstitutional (See Reply to Respondents' Point II, infra) in order to erase any doubt as to the federal basis for the decision.

Respectfully submitted

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